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Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 775

LOCAL 600, HIGHWAY & CITY FREIGHT DRIVERS, DOCKMEN & HELPERS, Affiliated With INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

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Local 600, Highway & City Freight Drivers, Dockmen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereafter called "Local 600" or "the Union", prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Eighth Circuit enforcing an order issued against Petitioner by the National Labor Relations Board.

## CITATIONS TO OPINIONS BELOW.

The opinion of the Board (R. 60-68)[1] is reported at 123 NLRB No. 3. The opinion of the Court below is reported at 273 F. 2d 272 (Appendix B, infra, pp. 23-34).

## JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28, U. S. C., and under Section 10 (f) of the National Labor Relations Act as amended, 61 Stat. 136, 29 U. S. C., Sec. 151, et seq.

The opinion and judgment of the Court of Appeals were issued January 5, 1960 (Appendix B, infra, pp. 23-34). Its decree was entered on January 27, 1960 (Appendix C, infra, pp. 35-36).

## QUESTIONS PRESENTED.

A member of a union for several years went to work in November under a collective bargaining agreement containing a valid union security clause under 8 (a) (3) of the National Labor Relations Act as amended. His union by-laws provided for automatic suspension after three months' dues delinquency. When he went to work he owed October dues, and when he failed to pay November and December dues he was suspended in accordance with the by-laws. Thereafter, he refused to pay a reinstatement fee imposed by the by-laws for suspended members, or dues for November and December, and the union thereafter demanded his discharge under the union-security provi-

[1] The record consists of the printed Record filed by the National Labor Relations Board in the Court below, references to which will be designated "R. . . .", and the Supplemental Record filed by this Respondent in the Court below, references to which will be designated "S. R. . . .", plus the opinion and decree of that Court

sion. Under these circumstances, the questions presented are:

(1) Does the 30-day grace period granted to employees under Section 8 (a) (3) of the Act within which to acquire membership under a union-security provision apply to new employees who are members of the contracting union when they commence employment under such a provision.

(2) May the union demand that such a member-new employee pay dues incurred prior to hiring, where he owed but one month's dues and because he was a member and had not been suspended, avoided the initiation fee required of new employees who were not members when hired.

(3) Even if the answer to Question 2 is in the negative, may a violation of the Act be found where the finding is based on evidence that is not substantial, when viewed in the light of the record as a whole.

(4) Is it a violation of 8 (b) (1) (A) and 8 (b) (2) of the Act for the union to demand discharge of the employee because he refused to pay the reinstatement fee imposed as a result of a three months' dues delinquency which included the pre-hire month of October.

(5) Where the union by-laws provide that dues shall be $5 per month if paid by the first of the month, and $6 per month if paid after the first of the month, is it a violation of 8 (b) (1) (A) for the union to threaten the member's discharge for refusal to pay the higher rate of dues when he did not pay his dues by the first of the month.

## STATUTES INVOLVED.

The statutory provisions involved are Sections 8 (a) (3), 8 (b) (1) (A) and 8 (b) (2) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. 151 et seq., and are reprinted in Appendix A hereof.

## STATEMENT.

This case arose out of unfair labor practice charges filed by the National Labor Relations Board against Local 600, charging that that Union had caused Spector Freight System, Inc. (hereinafter called "Spector" or "the Company"), to discharge one Paul H. Conrad for reasons other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the Union, all alleged to be a violation of Sections 8 (b) (1) (A) and 8 (b) (2) of the Act (R. 4-7).

A. **The Material Facts.** Paul Conrad had been a member of the Union since 1950 (R. 19; p. 24, infra). He paid his September, 1957, dues by money-order (R. 19-20). He was unemployed during October, 1957, and paid no dues for that month (p. 24, infra; R. 60). Conrad was hired by Spector as an over-the-road driver on November 6, 1957, at which time he signed a check-off card authorizing the Company to deduct $5 a month from his pay as dues, and remit that amount to the Union (p. 24, infra). However, in practice and by agreement with the Union, Spector deducted Union dues from its employees' pay only on a quarterly basis in advance, instead of monthly as called for by the check-off card (R. 50, 28-29, 32). Since Conrad was hired after the start of the last quarter in 1957, the Company informed him that he would have to pay his November and December dues direct to the Union (R. 32-33). Conrad neither paid dues directly to the Union in November and December, nor were such dues deducted from his pay for those two months (p. 24, infra).

On December 31, 1957, in accordance with the Union's Constitution and By-laws, an entry was made on Conrad's account card in the union office, suspending him for non-

payment of dues for three months; the last entry of dues payment having been made in September, 1957 (p. 24, infra; R. 44, 45, 47). By draft and covering letter of January 2, 1958, the Company, in accordance with its quarterly practice, remitted to the Union for Conrad, among other employees, $15 as quarterly dues for the months of January, February and March, 1958 (p. 24, infra). On January 6, the Union made three entries on Conrad's account card, each entry showing dues payment of $5, but the entries did not allocate the payments to any particular month as did prior entries (p. 24, infra).[2] In receipting for the quarterly dues sent in by the Company, the Union attached to the receipt dues stamps for all employees except Conrad and two others, said receipt carrying the notation after Conrad's name "N/S suspended", meaning "No stamps, suspended" (R. 13).

On January 8, the Company Supervisor informed Conrad that an officer of the Union wanted to see him. Later that day, Conrad had a conference with Patrick M. Neary, Secretary-Treasurer of the Union, at the latter's office (p. 25, infra). Neary told Conrad that he had been suspended for dues delinquency, and that under the Union's by-laws he could be restored to good standing only by paying a reinstatement fee of $60.00,[3] plus dues for October, November and December at $6.00 per month (since they had not been paid by the first of the month) or a total of $78.00.[4] Conrad protested that he was not working in October and not liable for dues for that month, nor

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[2] This $15.00 was later returned to Conrad by the Union at his request (S. R. 4; p. 25, infra).

[3] Which is the same as the initiation fee charged new members (S. R. 3).

[4] The Union by-laws provide that dues shall be $5.00 per month if paid on or before the first of the month, and $6.00 if paid after the first (R. 44).

for the reinstatement fee (R. 51). Neary told him that if he did not work in October, the by-laws provided that he could be reinstated by paying $72.00, consisting of the $60.00 reinstatement fee plus dues for November and December at $6.00 each (R. 30, 31, p. 25, infra). Neary also explained to Conrad at this meeting that while he would not have to pay the October dues to be reinstated, the failure to pay dues for that month still counted against his suspension (SR. 6). All Local 600 members owe dues, whether working or not (SR. 5), and if they do not care to continue paying dues during layoff, they can take a withdrawal card for 25¢ with which procedure Conrad was familiar (SR. 3). Conrad then asked for three weeks' time to pay which Neary granted (SR. 4). Conrad returned to work but made no further payment to the Union (p. 25, infra).

By letter to the Company dated January 30, 1958, Secretary-Treasurer Neary, acting for the Union, requested Conrad's discharge for failure to comply with the union-security provision of the Union's contract with Spector[3] (p. 25, infra; R. 43-44). Under the Union's Constitution, its Secretary-Treasurer is responsible for keeping records of dues payments and of those in good standing (SR. 7-8). Union President Grogan told the Company's labor relations director that Conrad's discharge was requested because of his failure to pay dues for October, November and December, 1957. On February 3, 1958, Conrad was discharged (p. 25, infra). The Union's Secretary-Treasurer testified that Conrad's discharge was requested for no reason other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership (SR. 5-6).

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[3] This contract required that all employees must become and remain "members in good standing" of the Union as a condition of employment (p. 25, infra, footnote 1).

B. **The Legal Conclusions.** The Board concluded that the Union had violated Sections 8 (b) (1) (A) and 8 (b) (2) of the Act by demanding Conrad's discharge for failure to pay dues for October, 1957, a period during which time he was not employed by the Company (p. 26, infra). The Board further concluded that the same two sections of the Act were violated by the demand of the Union for a $60.00 reinstatement fee from Conrad, since his suspension resulted from computation of dues for a period which included a time during which Conrad was under no statutory obligation to pay such dues in order to retain his job (p. 26, infra). Finally, the Board concluded that the Union also violated Section 8 (b) (1) (A) by threatening Conrad with loss of employment if he did not pay November and December dues at the rate of $6 per month rather than $5 per month, the Board concluding that the additional $1 constituted a penalty or fine (p. 26, infra).

The Court of Appeals affirmed each of the Board's conclusions. It found that a Union may not demand an employee's discharge for failure to pay dues incurred during a pre-hire period (p. 29, infra), and that the union had made such a demand (p. 30, infra). It made that factual finding solely on the basis of a stipulation as to President Grogan's statement to the labor relations director of Spector that Conrad's discharge was requested for failure to pay October, November and December, 1957 dues (p. 30, infra). The Court of Appeals did not even mention the additional evidence that Secretary Treasurer Neary, the officer charged with keeping records of dues and membership standing (SR. 7-8), and who had written the request for discharge letter (R. 43-44), had specifically told Conrad he would not have to pay October dues in his conversation with Conrad on January 8 (R. 30-31).

The Court of Appeals further concluded that while the union's by-laws require a $60.00 reinstatement fee from those delinquent three months or more, Conrad's suspension resulted from failure to pay dues for October, November and December, and since this period included the pre-hire period of October, the Union's demand for the reinstatement fee was unlawful (pp. 30-31, infra). Finally, the Court affirmed the Board's conclusion that the union by-law provision for dues of $5.00 if paid by the first of the month and $6.00 if paid later amounts to the imposition of a penalty of $1.00 for late payment of dues, and that any attempt to invoke the sanctions of the union-security agreement against Conrad in the event he refused to pay dues at the increased rate was a violation of 8 (b) (1) (A) of the Act (pp. 32-34, infra).

## REASONS FOR GRANTING THE WRIT.

The opinion of the Court of Appeals below has, contrary to the limitations imposed on Section 8 (b) (1) (A) of the Act, "impaired the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." In some respects it is in conflict with decisions of this Court and of another Court of Appeals, and in all respects decides important questions of Federal law [involving proper construction of Sections 8 (b) (1) (A) and 8 (b) (2) of the Act], which have not been but should be settled by this Court. The specific reasons for granting of the writ are as follows:

1. In its opinion, the Court of Appeals found that Conrad's termination was founded upon an unlawful demand for pre-hire dues (p. 29, infra). In doing so, it equated a demand by a union for delinquent dues with fines, penalties and special assessments (p. 29, infra), and since such items are obviously not "periodic dues" as that term is

used in 8 (b) (2), reference by the Court thereto is obviously irrelevant. The Court of Appeals then went on to hold that failure to pay periodic dues does not go so far as to make lawful the discharge of an employee for failure to liquidate a debt incurred for union dues before the employment in question began, citing in support thereof **National Labor Relations Board v. Murphy's Motor Freight, Inc., et al.**, 3 Cir., 231 F. 2d 654 at p. 655; **N. L. R. B. v. International Ass'n**, 9 Cir., 203 F. 2d 173; **N. L. R. B. v. International Union**, 7 Cir., 194 F. 2d 698, and **Local 140, etc.**, 109 N. L. R. B. 326 (p. 29, infra). In each of those cases, the employee involved was either not a member of the union when he began his employment, or the union-security contract was executed after he began employment.[6] Here, Conrad had been working for other trucking companies under the same union-security provision, and when he went to work for Spector he was already a member of the Union (S. R. 3). He was neither an ex-member nor a suspended member. His membership made it possible for him to escape the $60.00 initiation fee required of new employees who were non-members when employed (S. R. 3). Coming to work for Spector as a **member** he was thus under obligation to pay dues to retain that status, including October dues. Nothing in the Act, nor in the cases cited by the Court below lead to a contrary conclusion.

In **Wagner Iron Works**, 104 NLRB 445, the Board held in a unanimous decision that the legislative history of the

[6] In *Murphy*, the employee had been out of the union for 10 years and the union demanded back dues for all those years. In *N. L. R. B. v. Int. Union*, employee had been inactive for 8 years for which period dues were demanded. In *N. L. R. B. v. Int. Assn.*, the member had been both fined and expelled prior to execution of the union-security clause; further, his discharge was demanded, not for delinquency in paying dues, but for refusal to pay a fine. In *Local 140*, dues were sought for a period prior to the time a union-security clause was executed.

union security proviso to Section 8 (a) (3) of the Act[7] showed conclusively that Congress legislated **solely** for employees who were not union members; that it did not intend to provide a grace or escape period for employees who were already members; and that Congress intended the 30-day grace period to apply only to employees who were not members when the contract was signed and newly hired employees who were not union members. The Board further pointed out in the **Wagner** case (104 NLRB at 489) that the grace period was ended by **voluntary** acquisition of membership.[8] See also, **Chrisholm-Ryder Co.**, 94 NLRB 508, 509. Here, Conrad at no time took any position other than that he was a member at the date of hiring and remained a member.

Even if the Court of Appeals is correct in its construction of 8 (b) (2), and its companion section, 8 (a) (3), still that Court's opinion is in conflict with **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474. In that case, this Court, in construing Section 10 (e) of the Act which provides that "The findings of the Board with respect to questions of fact if supported by substantial evidence on

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[7] which reads "That nothing in this Act shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later."

[8] In *Atco Mfg. Co.*, 124 NLRB No. 86, issued August 31, 1959, the Board ruled that the 30-day escape period did apply to new employees who were members when they were hired. It did so in a 3 to 1 opinion, in which the majority did not review the legislative intent, did not even mention the *Wagner* case and thus left in effect two directly contrary opinions. Member Fanning vigorously protested that the majority's ruling was contrary to Congressional intent. Even so, the *Atco* case did not change the ruling as to voluntary acquisition of membership within the 30-day period. Further, since appellate courts apply equitable principles in enforcing Board orders, it would be unconscionable to apply an August, 1959, construction by the Board to a January, 1958, event. *NLRB v. National Biscuit Co.*, 185 F. 2d 123, 124.

the record considered as a whole shall be conclusive", held (340 U. S. at 488):

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The Court then went on to hold that under this provision, Courts of Appeal must assume more responsibilty for "the reasonableness and fairness" of Labor Board decisions than some courts had shown in the past; that Congress had imposed upon them the responsibility for assuring that the Board keeps within "reasonable grounds"; and that while the Board's findings are entitled to respect, they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of testimony or its informed judgment on matters within its special competence or both (340 U. S. at 490).

In this case, the Court below sustained the finding of the Board that the Union had demanded Conrad's failure to pay October dues. Like the Board, it based that finding solely on a stipulation in which the Union had entered that the Company discharged Conrad "after William J. Lemon, labor relations director of respondent company, was told by respondent union's president Grogan that Conrad's discharge was requested for failure to pay October-November and December, 1957 dues" (p. 30, infra). Neither the Board nor the Court below followed the mandate of this Court in **Universal Camera** that the record in its entirety must be considered, including the body of evidence opposed to the Board's view. The Court of Appeals did not consider the fact that Grogan, as President of the

Union, did not know the dues status of each member, and that the Secretary-Treasurer is charged under the Union's constitution to issue dues stamps and keep a record of those in good standing (S. R. 7, 8). It did not consider that it was Neary, the Secretary-Treasurer who kept the dues record of Conrad, who had his card marked "Suspended", who so notified the Company, who discussed Conrad's membership status with him and granted him three weeks to pay his reinstatement fee, and who wrote the letter requesting Conrad's discharge when Conrad failed to pay as promised (R. 30-31, 43-44, 47, 51). The Court below did not consider that the discharge was made, not at Grogan's request, and not pursuant to his statement to Lemon,[9] but, as stipulated, "pursuant to the January 30th letter, General Counsel's Exhibit 5, from Respondent Union's Secretary-Treasurer Neary" (R. 14). That letter simply requested Conrad's discharge for failure to comply with the union security provisions of the collective bargaining agreement (R. 43-44). Neary wrote it because he was the only one who knew the facts which justified its issuance. The Court below states (p. 30, infra) that the Union's position "is that there was no substantial evidence to support a finding that Conrad's discharge was occasioned by his failure to pay dues for October, November and December." That is not the Union's position. The discharge **was** occasioned by his failure to pay dues for October, November and December, for that resulted in his suspension and liability for a reinstatement fee. When he would not pay that fee his discharge was requested. That is what Grogan meant by his statement to Lemon. For the Court below to read into Grogan's language a statement that Conrad's discharge was requested because the union had demanded and Conrad had refused to pay October dues as **such** is unfair.

[9] In fact, there is nothing in the record indicating that the company relied in any way upon Grogan's statement to Lemon in determining to discharge Conrad.

unreasonable and ignores the balance of the record. That complete record clearly shows that once the Union learned that Conrad had not been working at the trade it dropped its demand that he pay October dues and insisted only upon payment of dues for November and December. As Neary explained to Conrad in their January 8th meeting, non-payment of dues for October counted toward his suspension (to make up with November and December the three months' of dues delinquency) because all members owe dues whether working or not. However, once the suspension occurred, liability for October dues ceased, since Conrad had not been working at the trade during that month (S. R. 5, 6). The Court below specifically found that Neary demanded only $72.00 (a reinstatement fee of $60.00 plus dues for November and December) in Conrad's conference with Neary on January 8th, almost four weeks before his discharge (p. 25, infra). For it to sustain the Board's finding that Conrad's discharge was demanded for failure to pay October dues **as such**, is not only inconsistent with this fact finding, but based as it is solely on an excerpt from a stipulation of the parties, and without giving consideration to the record as a whole, is clearly in violation of this Court's admonition in **Universal Camera**, supra.

2. The Court below further found that the Union did not have the right under the Act to condition Conrad's continued employment upon payment of the reinstatement fee of $60.00 (pp. 30-31, infra). The theory of that Court was that while the Union's by-laws provided that any member delinquent three months or more had to pay a $60.00 reinstatement fee, it could not demand such a fee as a condition of continued employment in this case because the three months' dues delinquency included the pre-hire period of October, 1957 (p. 31, infra). In holding that this was a violation of the Act, the Court of Appeals relied solely on **Local 140, etc.**, 109 N. L. R. B. 326 (p. 31, infra).

In that case, after a two-months' strike a union entered into a contract containing union-security and check-off clauses. That union had levied an assessment and planned to collect it through check-off authorizations covering both dues and the assessment. A few of the employee-members refused to sign such cards. They did, however, send in their dues for the months after settlement of the strike, but these dues were returned with a notation that they owed for the strike period. They then tendered their dues to include those two months and that tender was rejected. While the opinion of the Board was unanimous as to the result there were three separate concurring opinions. There are these significant differences in the two cases: (1) In **Local 140, etc.**, hostility and discrimination were present and at least one Board member found that to be the real cause for the discharge request. Here, there is not even a suggestion of Union hostility toward Conrad. Instead, all that was shown was that the Secretary-Treasurer demanded the dues and reinstatement fee set out in the by-laws, which any member in a similar situation would be asked to pay (S. R. 5-6); (2) No attempt here was made to collect dues for a pre-hire or pre-union security contract period; and (3) No new employment was involved as here, the significance of which will be demonstrated hereafter.

Here we must take a good hard look at the facts. When Conrad went to work in November, had he been a new member he would have had to pay a $60.00 initiation fee after thirty days. He did not have to pay such an initiation fee because he was already a member. Certainly it cannot be the intention of Congress that a man can receive the benefits of membership (including no requirement for an initiation fee), and still not be subject to complying with the financial obligations of membership. Conrad was suspended under the Union's by-laws because he permitted three months to go by without paying dues.

In **Int. Assn. of Machinists (Adel Precision Products)**, 120 NLRB 1223, the Board held that it is not an 8 (b) (2) violation for a union to demand a larger reinstatement fee from former members than the initiation fee required of new members. In the **Adel** case, the Board adopted the reasoning in **Food Machinery and Chemical Corp.**, 99 NLRB 1430, which held that a union may reasonably classify members into former members and new members, and may give special consideration to former members, more or less favorable to that afforded new members, depending on the history of the individual's union membership. Here, the Court below has held in effect that the Union must give consideration to Conrad's past history as a member in determining that an initiation fee should not be charged, but must disregard that history in determining whether or not he was subject to suspension.

The **Adel** case was followed shortly by **Local 173 (Hubley Mfg. Co.)**, 121 NLRB 170. There, an employee quit employment under a union security contract in September, 1955, but did not take a withdrawal card (as is this case). When he returned to work in July, 1957, he was advised that since he had not obtained an honorary withdrawal card he would have to pay a $25.00 reinstatement fee (as opposed to $5.00 for new members). When he refused to pay it, the union demanded and obtained his discharge. Under the union's constitution a member who failed to pay dues for three months was suspended and had to pay a reinstatement fee. Relying upon **Food Machinery** and **Adel**, the Board unanimously held that the demand for discharge was valid, though the reinstatement fee was higher than an initiation fee, since the reinstatement fee was in accordance with long-standing union policy, was sanctioned by the union's constitution, and applied to all in similar situations. Those elements are all present here. Both in **Adel** and in **Hubley**, there was necessarily the imposition of a reinstatement fee based upon a failure to pay dues during a pre-hire period. The member in those two cases

could not have been a "former member" when he went to work from which he was discharged, were it not for the fact that he became delinquent (and lost that membership in good standing) during a pre-hire period. If, in the **Adel** case, the Board permitted three months of delinquency during a pre-hire period to count toward suspension, how can the Court of Appeals uphold the Board's decision in the instant case which rules out but a single month of such delinquency?

Again, in **National Automotive Fibres**, 121 NLRB No. 173, an employee was laid off and applied for a withdrawal card, but was denied it because he owed a fine. As here (SR. 3), no dues were required if a person takes out a withdrawal card.[10] He was recalled to employment, paid his first month's dues in cash and signed a check-off form for the months thereafter. During the next several months he was told he would have to pay back dues for the period during his layoff or a new initiation fee. While the Board found an 8 (b) (2) violation, it did so only because it found the "causative factor" for his dues delinquency was his refusal to pay a fine, which prevented him from getting a withdrawal card. The Board did not consider this a reasonable classification within the **Food Machinery doctrine**. The Board's opinion clearly indicates that had his dues delinquency not been incurred as a result of his refusal to pay a fine, the demand of the union would have been lawful, as a reasonable classification.

Summing up then, Conrad's discharge was not terminated for any reason other than his failure to tender the periodic dues uniformly required as a condition of retaining membership. Here, the Court of Appeals' opinion

[10] The Court below's decision would put Conrad in the same position as those who had taken such a card, for it would deny the Union's right to impose the obligation to pay dues when not employed. This is a clear interference with the Union's right to prescribe its own rules with respect to the retention of membership as guaranteed by Section 8 (b) (1) (A) of the Act.

means that Conrad may avoid payment of an initiation fee because of his pre-hire history of union membership, but may also avoid suspension by removing from consideration that same history. Certainly, Conrad should not be permitted to "have it both ways."

The evidence is clear here that the Union at no time demanded more in the way of dues from Conrad than it required from any other member to retain membership. Conrad sought a "free ride" in his refusal to pay regular monthly dues, and the Court of Appeals' opinion has awarded him one, contrary to the intent of Congress.[11]

To uphold the opinion of the Court below is to hold that in spite of the Act's guarantee under the proviso to Section 8 (b) (1) (A) of the Act against non-interference with the union's right to prescribe its own rules for retention of membership, the Board and the courts may prescribe such rules. It will mean that the Union can no longer grant a grace period before suspending if it wants to avoid loss of dues, but will have to resort to automatic suspension for failure to pay dues each and every month. It is an unreasonable construction of the law; it is an unjust one. The conclusion of the court below that it was unlawful to demand Conrad's discharge because he would not pay the reinstatement fee imposed as a result of suspension imposed for failure to pay dues for a three months' period which included a prehire period is not in accord with the provisions of the Act, with the legislative history of the Act, or with the Board's previous and not yet overruled opinions on the same point.

3. The Court below, in finding and concluding that the Union violated 8 (b) (1) (A) of the Act by threatening Conrad with loss of employment if he did not pay delinquent dues at the rate of $6 rather than $5 per month (p. 34, infra), has issued an opinion directly in conflict

[11] *Radio Officers' Union v. N. L. R. B.*, 347 U. S. at 41.

with **N. L. R. B. v. Bakery & Confectionery Wkrs.**, 3 Cir., 245 F. 2d 211.

As the opinion of the Court below set out (p. 32, infra), the union by-law in question reads:

> "The dues for this Local Union shall be not less than five ($5.00) Dollars per month and shall be paid on or before the first day of the current month. Dues paid after the first of the month shall be six ($6.00) Dollars."

Secretary-Treasurer Neary testified without contradiction that the entire $6.00 is dues, but if members pay their dues before the first of the month they get their dues cheaper; that is, for $5.00 (R. 31).

Still, the Court below reached the conclusion that the charge of $1.00 more in dues for those who paid after the first of the month constituted a penalty (p. 33, infra). As one reason for such conclusion, it found that by fixing the dues to be paid currently at $5 per month "the Union unquestionably determined that this amount would produce ample operating revenue, so that it can scarcely be argued that the $1 is designed to increase revenue for normal union operations" (p. 33, infra). In so stating, the Court of Appeals has engaged in conjecture as to (1) the reasons for the Union setting the dues in the amount it has and (2) the amount of revenue the Union needs or hopes to attain through dues collections, both matters lying solely within the discretion of the Union members, as guaranteed by the proviso to 8 (b) (1) (A). Further, it has misread the union by-laws. These members who pay $6 dues pay "current" dues, i. e., dues for the month in which they are paid. However, if they pay them by the first of the month they only have to pay $5.00.

The Court below states as a further reason for concluding that those who are charged $6 dues are in effect charged with a $1 penalty, that "the $1, not being collected

monthly as a matter of course, is by its nature not a periodic payment, collected as such in a normal due structure. This is readily apparent from Conrad's union dues card, an exhibit in the record" (p. 33, infra). Petitioner submits that that exhibit (R. 47) shows plainly that there are either $5 dues or $6 dues. For instance, that exhibit shows in the column "Class.", entries of "5D" (which obviously means "$5.00 dues") for the months of January through June, 1957, and then "6D" (or "$6.00 dues") for July and August of 1957. Thus, this exhibit clearly shows that whether a man pays $5.00 or $6.00, it is all **dues.**

The opinion of the Court is directly in conflict with the Third Circuit's opinion in **N. L. R. B. v. Bakery & Confectionery Wkrs., etc.,** supra. There, the Union's Constitution had provided that those who failed to pay dues by the last of the month would be assessed $1.00. In **Great Atlantic & Pacific Tea Company,** 110 N. L. R. B. 918, the Board found this to be a violation of 8 (b) (1) (A) where threats of discharge were made to those who refused to pay this assessment. The Union then raised its dues $1.00 per month, but provided that those who paid before the last of the month would get a $1.00 discount. Charges were again brought against the Union, and the Board in a 3 to 2 opinion[12] again found the Union guilty, holding that the change in dues structure was a mere subterfuge. However, the Third Circuit reversed the Board (245 F. 2d 211). In doing so, it found that the provision for lesser dues if promptly paid not only was of value to the union by inducing prompt payment, but advanced the cause of union-management relations by reducing the instances in which the union would be forced to invoke its union-security contract by asking for discharge for non-payment of dues (245 F. 2d at 214, footnote

[12] *Bakery and Confectionery Workers' Int. Union,* 115 N. L. R. B. 1542.

1). The Third Circuit further pointed out that what the union had done in **Bakery Workers** was simply to make the amount of dues contingent upon the date of payment; that members could pay before the last of the month and take advantage of $1 discount; or exercise their option to pay within the next fifteen days at the full amount; that the plan affected every member, and the option came into play every month.

That is precisely the situation here. Each member is given an option to save $1.00 by paying his dues by the first of the month, or to pay the larger amount of $6 dues if he pays after the first. Like the **Bakery Workers** case, the plan affects every member, and the option comes into play every month.

The opinion of the Court below holds that the dues structure in the Bakery Workers case afforded an option to receive a benefit, but that the dues structure in this case did not and was therefore distinguishable (pp. 33-34, infra). Petitioner earnestly submits that the two cases are on all fours and that this case presents a clear case of a conflict between two Courts of Appeal.

## CONCLUSION.

For the reasons noted, it is respectfully submitted that the foregoing petition for certiorari should be granted.

HARRY H. CRAIG,

NORMAN W. ARMBRUSTER,

WILEY, CRAIG, ARMBRUSTER & WILBURN,
4 North Eighth Street,
St. Louis 1, Missouri,
Counsel for Petitioners.

## APPENDIX A.

The pertinent provisions of the Labor-Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Sec. 151 et seq.), are as follows:

* * * * * * *

"**Section 8 (a)** It shall be an unfair labor practice for an employer . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (I) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with Section 9 (f), (g), (h), and (II) unless following an election held as provided in Section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any dis-

crimination against an employee for non-membership in a labor organization (A) If he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition or acquiring or retaining membership;"

. . . . . .

"**Section 8 (b)** It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ."

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

. . . . . .

## APPENDIX B.

United States Court of Appeals,
for the Eighth Circuit.

No. 16,291.

| | |
|---|---|
| National Labor Relations Board, Petitioner, vs. Spector Freight System, Inc., et al., Respondents. | On Petition for Enforcement of an Order of the National Labor Relations Board and on Cross-Petitions for Review of Said Order. |

[January 5, 1960.]

Before Johnsen, Chief Judge; and Van Oosterhout and Matthes, Circuit Judges.

Matthes, Circuit Judge.

Pursuant to § 10 (e) of the National Labor Relations Act, 29 U. S. C. A. § 160 (e) [hereinafter referred to as "Act"], the National Labor Relations Board [hereinafter called "Board"], petitions for enforcement of its order against respondent Spector Freight System, Inc. [hereinafter called "Company"] and respondent Local 600, Highway & City Freight Drivers, Dockmen & Helpers [hereinafter called "Union"]. The Company and Union have cross-petitioned for review of the Board's order pursuant to

§ 10 (f) of the Act, 29 U. S. C. A., § 160 (f). The Board's decision and order are reported at 123 N. L. R. B. No. 3. See also, CCH N. L. R. B. Decisions, 1958-1959, ¶ 56,088.

The Board's action resulted from charges brought by Paul H. Conrad to the effect that certain acts of respondents, culminating in his discharge by Company, at the request of Union, constituted unfair labor practices in violation of the Act. Union alleged that Conrad's discharge was lawfully demanded pursuant to its union-security agreement with Company, and Company contended that it acted in good faith in discharging Conrad, pursuant to lawful demand made under said security agreement.

The pertinent facts, as found by the trial examiner, and adopted by the Board, are as follows:

Paul Conrad, who had been a member of Union for a number of years, was employed by Company as an over-the-road driver on November 6, 1957. He was unemployed during October. When Conrad was hired by Company he executed a check-off card which authorized Company to deduct $5 from Conrad's pay as dues, and remit that amount to Union on a monthly basis. Conrad did not pay dues directly to Union in November and December, and no dues were deducted from his pay for those two months. On December 31, 1957, in accordance with Union's constitution and bylaws, an entry was made on Conrad's account card, suspending him for nonpayment of dues for three months, the last entry of dues payment having been made in September, 1957. By draft and covering letter of January 2, 1958, Company, in accordance with its quarterly practice, remitted to Union, for Conrad, among other employees, $15 as quarterly dues for the months of January, February and March, 1958. On January 6, Union made three entries on Conrad's account card, each entry showing dues payment of $5; the entries did not allocate the payments to any particular month as did prior entries on the

card. On January 8, John J. Lloyd, Company Supervisor, informed Conrad that an officer of Union wanted to see him, and that Conrad should not go out on a trip until he had cleared with Union. Later that day Conrad had a conference with Patrick M. Neary, secretary-treasurer of Union, at the latter's office, at which time Neary took the position that in accordance with the by-laws, Conrad owed dues at the rate of $6 per month, instead of $5, for either two or three months. Neary further insisted that Conrad also owed a reinstatement fee of $60 because of his suspension for failure to pay dues for October, November and December. Neary informed Conrad that the least Union would accept was $72—a reinstatement fee of $60 plus dues for November and December at the rate of $6 for each month. Conrad took the position that he was not obligated to pay the reinstatement fee and was not liable for dues for October because he was unemployed during that month. At the close of this meeting, Neary informed Lloyd by telephone that Conrad could remain on the job; that there was some discrepancy, but he was certain the matter could be worked out. Conrad returned to the job, but made no further payment to Union.

By letter to the Company dated January 30, 1958, Union requested Conrad's discharge for failure to comply with the union-security provision of Union's contract with Company.[1] Union's president also informed the labor relations director of Company that Conrad's discharge was requested because of his failure to pay dues for October, November and December, 1957. Conrad was discharged on February 3, 1958. Thereafter, and within a few days, Union refunded the $15 to Conrad which was the amount the Company had deducted from his pay and remitted to Union.

[1] This contract required that all employees must become and remain "members in good standing" of Union as a condition of employment.

From the foreging facts, the Board concluded that Union's insistence upon Conrad's discharge was unlawfully predicated upon his nonpayment of the October pre-hire dues, and that Company "was fully apprised that the discharge was demanded for this reason." Accordingly, the Board concluded that Company and Union had violated §§ 8 (a) (3), 8 (a) (1) and 8 (b) (2), 8 (b) (1) (A), respectively, by discharging Conrad for failure to pay dues for October, 1957, during which time he was not employed by Company.

Additionally, the Board concluded that even if it be assumed that Conrad's discharge was not predicated upon his failure to pay October dues, but because he failed to pay the reinstatement fee of $60, as urged by Union, Conrad's termination of employment was a violation of §§ 8 (b) (1) (A), 8 (b) (2), 8 (a) (3) and 8 (a) (1), this for the reason that the fee which Union sought to exact resulted from computation of dues for a period during which Conrad was under no statutory obligation to pay such dues in order to retain his job. On this issue, the trial examiner found that such demand for the reinstatement fee constituted restraint and coercion by Union, only in violation of § 8 (b) (1) (A) of the Act. By finding such demand to be a violation of § 8 (a) (3) and § 8 (a) (1), it is apparent that the Board concluded that, by discharging Conrad for non-payment of the reinstatement fee, based unlawfully upon a pre-hire arrearage, the Company also had violated the Act.

In addition, the Board also adopted the trial examiner's finding and conclusion that Union violated § 8 (b) (1) (A) of the Act by threatening Conrad with loss of employment if he did not pay November and December dues at the rate of $6 rather than $5 per month the additional $1 constituting a penalty or fine.

The Board's order now before us, provided that, as to Company, it should cease and desist from encouraging

membership in Union by discharging any of its employees or discriminating in any other manner in regard to their hire or tenure, except as authorized by § 8 (a) (3) of the Act; or from restraining its employees in the exercise of the rights guaranteed in § 7 of the Act. As to Union, the order required it to cease and desist from causing or attempting to cause Company to discriminate against its employees in violation of § 8 (a) (3); from threatening to enforce any provisions of its constitution or bylaws in such a way as to condition employment upon payment of assessments or fines for nonpayment of periodic dues, or to condition employment upon payment of a reinstatement fee predicated upon a prehire arrearage, in violation of § 8 (b) (1) (A) of the Act; or to restrain its members in the exercise of rights guaranteed by § 7 of the Act. In addition, the order required that Union take affirmative action by notifying Company that it withdraws objections to Conrad's employment, and by requesting that Company offer him immediate reinstatement; that Company offer reinstatement to Conrad; that Union and Company, jointly and severally, make Conrad whole; and that Company and Union post appropriate notices.

The National Labor Relations Act provides that employers and unions may enter into agreements whereby membership in a union may be required as a condition of continued employment. Section 8 (a) (3). Labor organizations enjoy the right to prescribe their own rules for acquisition or retention of membership. Section 8 (b) (1). However, it is further provided that non-membership or loss of membership, as grounds for dismissal, may only be founded upon failure of the employee to tender "the periodic dues and the initiation fees uniformly required as a condition of membership."[2] As stated by the Supreme

[2] Section 7 of the Act, 29 U. S. C. A. § 157, while guaranteeing employees' rights to organize, bargain collectively, etc., further provides that employees "shall also have the right to refrain from any or all of such activities except to the extent that such right may be

Court in **Radio Officers Union v. N. L. R. B.**, 347 U. S. 17, 40, "The policy of the Act is to insulate employees' jobs from their organizational rights."

> "The right to membership lies with the union alone, but the right to a job is surrounded by safeguards which limit a union's acts." **Murphy's Motor Freight, Inc.**, 113 N. L. R. B. 524, 534, **enforced**, 3 Cir., 231 F. 2d 654.

Thus the internal rules of a labor organization, designed to control its members, such as imposition of fines for failure to attend meetings, special assessments, and other

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affected by an agreement requiring membership in a labor organization as a condition of employment . . ."

Section 8 (a) (3), 29 U. S. C. A., § 158 (a) (3), authorizes employers to enter into agreements whereby membership in a union, within a 30-day period after employment, may be made a condition of such employment, but no discrimination against an employee for non-membership in a labor organization may be justified if the employer "has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8 (b), 29 U. S. C. A., § 158 (b), provides:

"It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 [§ 7] of this title; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . . or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

It has been held by the Board that, when properly founded, a union may validly demand a reinstatement fee. *See Local 475*, 121 N. L. R. B. 170; *International Association of Machinists*, 120 N. L. R. B. 1223, and compare *N. L. R. B. v. International Ass'n*, 9 Cir., 203 F. 2d 173 (right to re-instatement unlawfully conditioned upon payment of pre-existing fine).

penalties, not being "periodic dues," may not be enforced by the union by a threat of loss of employment. See **Radio Officers Union v. N. L. R. B.**, 347 U. S. 17 (loss of seniority for late payment of dues; suspension for non-compliance with union's hiring rules); **Westinghouse Electric Corp.**, 96 N. L. R. B. 522, enforced: **N. L. R. B. v. International Ass'n of Machinists**, etc., 9 Cir., 203 F. 2d 173 (fine for dual unionism); **The Electric Auto-Lite Company**, 92 N. L. R. B. 1073, enforced: **N. L. R. B. v. Electric Auto-Lite Company**, 6 Cir., 196 F. 2d 500, cert. denied, 344 U. S. 823 (failure to attend meetings); **N. L. R. B. v. Eclipse Lumber Co.**, 9 Cir., 199 F. 2d 684 (refusal to picket); **The Great Atlantic & Pacific Tea Co.**, 110 N. L. R. B. 918 (dues delinquency); **Union Starch & Refining Co. v. N. L. R. B.**, 7 Cir., 186 F. 2d 1008, cert. denied, 342 U. S. 815 (refusal to take loyalty oath and attend meetings); **N. L. R. B. v. Philadelphia Iron Wks.**, 3 Cir., 214 F. 2d 937 (enforcement of hiring rules).

The Board's finding that Conrad's termination was founded upon an unlawful demand for pre-hire dues, as a condition of employment, has ample support in fact and law. Prior decisions have held that payment of dues or other debts accruing prior to existence of a union-security agreement, or prior to employment, may not be required as a condition to continued employment. Failure to pay "periodic dues" does not go "so far as to make lawful the discharge of an employee for failure to liquidate a debt incurred for union dues before the employment in question began." **National Labor Relations Board v. Murphy's Motor Freight, Inc., et al.**, 3 Cir., 231 F. 2d 654, at p. 655, and cf. **N. L. R. B. v. International Ass'n**, 9 Cir., 203 F. 2d 173 (failure to pay pre-existing fine); **N. L. R. B. v. International Union**, 7 Cir., 194 F. 2d 698, and **Local 140**, etc., 109 N. L. R. B. 326 (loss of good standing as grounds for dismissal unlawfully based upon dues accruing before security agreement).

While Company and Union do not expressly concede that the failure of Conrad to pay dues for October, a pre-hire month, would not constitute a legal basis for terminating his employment, this concession is clearly implicit in their respective briefs. In essence, their position is that there was no substantial evidence to support a finding that Conrad's discharge was occasioned by his failure to pay dues for October, November and December. In so contending, respondents overlook the stipulation they entered into at the hearing, wherein it was agreed that Company discharged Conrad pursuant to the letter from Union's secretary-treasurer, "after William J. Lemon, labor relations director of respondent company, was told by respondent union's president Grogan **that Conrad's discharge was requested for failure to pay October, November and December, 1957, dues.**" Moreover, in so far as Company is concerned, its Mr. Lloyd testified that he had no reason to believe that Union was requesting Conrad's discharge "for anything other than nonpayment of delinquent dues for the months of October, November, and December." In view of the foregoing, and other pertinent facts and circumstances which have been carefully considered, it seems clear to us that the Company's liability was properly based upon a finding that it had "reasonable grounds" for believing that Union had requested Conrad's discharge for reasons other than his failure to tender the periodic dues uniformly required; and that its discharge of Conrad constituted a violation of §§ 8 (a) (3), 8 (a) (1).

We are also of the opinion that **Union** did not have the right under the Act to condition Conrad's continued employment upon payment of the reinstatement fee of $60. In this connection, we observe that § 36 of Union's bylaws provides that "(a)ny member delinquent three (3) months or more must pay a Sixty ($60.00) Dollars reinstatement fee * * *." Thus, it appears that the reinstatement fee

was predicated upon dues delinquency for three months — here, that period had to be October, November and December, meaning that the $60 fee resulted from the inclusion in the delinquency period of a month for which Conrad was under no statutory obligation to pay dues. We cannot sanction this procedure, because obviously it would permit a union to do indirectly what it recognizes it is prohibited from doing directly. As stated by the Board in **Local 140**, etc., 109 N. L. R. B. 326, at p. 328, "In both instances, the employees are penalized for not paying dues at a time when they were legally privileged to refuse to do so without jeopardizing their jobs." But there is no basis for the Board's finding that Union's conduct with respect to the reinstatement fee also constituted a violation by Company of §§ 8 (a) (3) and 8 (a) (1). The record does not demonstrate that Company was requested to discharge Conrad because of his failure to pay the **reinstatement fee** — indeed we find nothing to indicate that Company was aware that this fee had been demanded. Neither is there proof that Company was cognizant of Union's bylaw No. 36. However, this erroneous finding by the Board does not invalidate its order against Company, which finds support on the ground hereinabove discussed.

This brings us to the issue of whether Union violated the Act by threatening Conrad with loss of employment if he did not pay delinquent dues at the rate of $6 rather than $5 per month. The Board insists that the extra $1 demanded for late payment was not a part of the "periodic dues * * * uniformly required as a condition of acquiring or retaining membership," § 8 (b) (2), and that therefore Union could not invoke the sanctions of the union security agreement against Conrad in the event he failed to pay the dues at the increased rate. It is said that the additional $1 imposed upon delinquent members is tantamount to a fine or assessment for failure to pay dues on time, and that such increased payments are intermittently imposed and by their very nature not periodic.

Union presents a two-pronged contention. First, that there was no substantial evidence that it threatened Conrad with loss of employment if he failed to pay dues for November and December. Secondly, that the additional $1 does not constitute an assessment or fine, but as stated in the bylaw, is in reality dues; that the effect of the bylaw is to grant members an option of saving $1 by paying dues before the first of the month. Union argues this issue is settled by **N. L. R. B. v. Bakery & Confectionery Wkrs.**, 3 Cir., 245 F. 2d 211. The first contention is clearly without merit. There was substantial evidence to support the Board's finding that Conrad's job was threatened and placed in jeopardy by Union because he would not accede to its request to pay dues at the increased rate.

It is now firmly settled that payment of assessment, penalties or fines cannot be made a condition of continued employment. Such items do not fall within the category of "periodic dues" within the meaning of the Act, and their imposition restrains and coerces employees in the exercise of their rights under § 7 of the Act [to refrain from any and all union activities except membership required under a union security agreement], contrary to § 8 (b) (1) (a). See cases cited, p. 7.

The Union bylaw fixing the dues provides: "The dues for this Local Union shall be not less than five ($5.00) Dollars per month and shall be paid on or before the first day of the current month. Dues paid after the first of the month shall be six ($6.00) Dollars." The constitution of International Brotherhood of Teamsters, Chauffeurs, etc. with which Union is affiliated, provides with respect to payment of dues: "All members paying dues to local unions must pay them on or before the first business day of the current month, in advance. Any member failing to pay his dues at such time shall not be in good standing." In determining the real purpose of the additional $1 re-

quired of late paying members only, we look through form to substance. So viewing the situation, we cannot escape the conclusion that the additional amount is in reality in the nature of a penalty, imposed because of failure to pay during the current month. By fixing the dues to be paid currently at $5 per month Union unquestionably determined that this amount would produce ample operating revenue, so it can scarcely be argued that the $1 is designed to increase revenue required for normal union operations. Further, it is apparent that the additional $1 not being collected monthly as a matter of course, is by its nature not a periodic payment, collected as such in a normal dues structure. This is readily apparent from Conrad's union dues card, an exhibit in the record.

In **N. L. R. B. v. Bakery & Confectionery Wkrs.**, 3 Cir., 245 F. 2d 211, relied upon by Union, the bylaws fixing dues were couched in terms of allowing a discount from the stated monthly dues figure, if payment was made before the last day of the month in which dues were payable. The Third Circuit viewed this structure as affording the member an option to receive a benefit and the member's failure to take advantage of the discount could in no way be deemed as an assessment of a penalty.[4] Inasmuch as the

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[4] But see *The Electric Auto-Lite Company*, 92 N. L. R. B. 1073, enforced, *N. L. R. B. v. Electric Auto-Lite Company*, 196 F. 2d 500, where monthly dues were increased from $1.50 to $2, with a provision that members who attended each monthly meeting would be entitled to a 50c exemption. Upon other evidence, the Board concluded "regardless of the means adopted to institute this charge, the necessary and intended effect was to fix a penalty upon those members who did not attend the monthly meetings. We cannot consider such a charge, with the conditions attached, as regular monthly dues. In our opinion, it is nothing other than a *fine*." 92 N. L. R. B. at p. 1074.

It is possible that a "discount" system of fixing dues would be open to abuse, inasmuch as dues could be set at higher figures, with discounts allowed for compliance with various internal rules of the union, thus indirectly accomplishing forceable collection of fines or performance of union duties.

Union bylaw here involved is in our opinion distinguishable and is in no way designed to afford optional benefits to its members, it is unnecessary to consider the persuasion of **N. L. R. B. v. Bakery & Confectionery Wkrs.** etc., supra.

Union's insistence upon payment of dues for November and December, at an increased rate, thereby threatening Conrad with loss of good standing and employment, constituted a violation of § 8 (b) (1) (A) of the Act.

We have conscientiously searched the record in its entirety, according to our responsibility upon review, as outlined by the Supreme Court in **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474, 490, and we are satisfied that the findings and conclusions of the Board are supported by substantial evidence, when viewed on the record as a whole, and that its order is proper and entitled to enforcement.

The petitions to set aside the order will be denied and a decree for the enforcement of the order will be entered. It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

## APPENDIX C.

### (Decree.)

United States Court of Appeals
for the
Eighth Circuit

No. 16291 - - - September Term, 1959.

National Labor Relations Board,

Petitioner,

vs.

Spector Freight System, Inc.; and Local 600, Highway & City Freight Drivers, Dockmen & Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondents.

Before: Johnsen, Chief Judge; and Van Oosterhout and Matthes, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondents, their officers, representatives, agents, successors, and assigns, on March 5, 1959. The Court heard argument of respective counsel on November 20, 1959 and has considered the briefs and transcript of record filed in this cause. On January 5, 1960 the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Eighth Circuit that the said order of the National Labor

Relations Board in said proceeding be enforced, and that Spector Freight System, Inc., its officers, agents, successors, and assigns and Local 600, Highway & City Freight Drivers, Dockmen & Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

January 27, 1960.

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## CITATIONS

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STATUTE:


National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

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|---|---|
| Section 8(a)(1) | 2, 5 |
| Section 8(a)(3) | 2, 5, 6 |
| Section 8(b)(1)(A) | 2, 5 |
| Section 8(b)(2) | 2, 5, 6 |

# In the Supreme Court of the United States

OCTOBER TERM, 1959

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No. 775

LOCAL 600, HIGHWAY AND CITY FREIGHT DRIVERS, DOCKMEN & HELPERS, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

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No. 794

SPECTOR FREIGHT SYSTEM, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

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**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Court of Appeals (Company Pet. 11-22, Union Pet. 23-34) is reported at 273 F. 2d 272. The Board's Decision and Order (R. 60-68)[1] are reported at 123 NLRB No. 3.

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[1] "R" refers to the Board appendix filed with the court below.

## JURISDICTION

The opinion and judgment of the Court of Appeals was issued on January 5, 1960 (Company Pet. 11-22, Union Pet. 23-34), and a decree was entered on January 27, 1960 (Company Pet. 23-24, Union Pet. 35-36). The petition for a writ of certiorari in No. 775 was filed on March 9, 1960, and that in No. 794 was filed on March 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. The petition in No. 775 presents these questions:

(a) Whether the record supports the Board's finding that the Union, in violation of Section 8(b)(2) and (1)(A) of the National Labor Relations Act, caused an employee to be discharged for failure to pay dues for October, a month when the employee was not employed by the employer and thus not subject to the union-security agreement between the Union and the employer.

(b) Whether the record supports the Board's finding that the Union, in violation of Section 8(b)(1)(A) of the Act, threatened the employee with loss of employment if he did not pay dues at a penalty rate for November and December, months when he was employed.

2. The petition in No. 794 presents this additional question:

Whether the record supports the Board's finding that the employer, in violation of Section 8(a)(3) and (1) of the Act, discharged the employee with knowledge of the fact that the dues delinquency asserted by the Union involved a period before the employee was employed by the employer.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in the petitions (Company Pet. 10, Union Pet. 21-22).

## STATEMENT

### A. The Board's Findings

On November 6, 1957, Conrad was hired by petitioner Company as an over-the-road driver and executed a checkoff card authorizing the Company, pursuant to its contract with the Union, to deduct $5 from his pay each month and remit that sum as dues to the Union (R. 49; 13, 19). The contract also contained a union security clause which required that all employees must become and remain "members in good standing" of the Union as a condition of employment. Prior to his November employment, Conrad was a Union member for several years and had paid his Union dues through September 1957. He did not pay dues in October, a month during which he was unemployed.

The Company, in practice, deducted dues from its employees' wages only on a quarterly basis in advance, instead of monthly as called for by the checkoff card (R. 50; 28). Since Conrad was hired after the beginning of the last quarter in 1957, the Company did not deduct dues for November and December (R. 49-50; 32-33). Conrad did not pay his November and December dues directly to the Union nor did he pay dues for October (R. 49; 23).

The Union, pursuant to its constitution and bylaws, suspended Conrad from membership on December 31 because he had not paid dues for the past three months

(R. 50; 29-30).[2] On January 2, 1958, the Company remitted quarterly dues to the Union, including $15 covering Conrad's dues for January, February and March (R. 50; 13). The Union noted on the return receipt to the Company that Conrad had been suspended.

On January 8, following a telephone call from Union President Grogan, the Company's driver supervisor, Lloyd, informed Conrad that he could not work without Union clearance and that he was to report to the Union office (R. 50; 20, 34, 37). At the Union office Secretary-Treasurer Neary advised Conrad that he had been suspended from the Union for dues delinquency and that, under the Union's bylaws, he could be restored to good standing only upon the payment of a $60 reinstatement fee and dues payments for October, November and December at the increased rate of $6 a month for late payment of dues (R. 51; 22-23, 30, 31).[3] Conrad protested that he was not liable for October dues since he was not employed during that month and therefore that he was not obligated to pay a reinstatement fee (R. 51; 22-23). Neary replied that the Union would not accept less than the $60 reinstatement fee and dues for November and December at the $6 rate for delinquent dues (R. 51; 31). Neary then notified

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[2] The International Constitution provides, (R. 45) that: "Any member who shall be three months in arrears in the payment of dues • • •, at the end of the third month, shall automatically stand suspended and shall not be entitled to any rights or privileges as a member of the local union • • •."

[3] The Union bylaws provide (R. 44) that: "The dues • • • shall be not less than five ($5.00) Dollars per month and shall be paid on or before the first day of the current month. Dues paid after the first of the month shall be six ($6.00) Dollars. Any member delinquent three (3) months or more must pay a sixty ($60.00) Dollar reinstatement fee • • •."

Lloyd by telephone that he was certain that the "discrepancy" would be straightened out and that Conrad could continue at work (R. 51; 30). Conrad returned to work but made no payment to the Union on or after January 8.

By letter dated January 30, 1958, the Union requested the Company to discharge Conrad because he had failed to remain a member in good standing of the Union, as required by their collective bargaining agreement (R. 51; 43-44). Union President Grogan advised Lemon, the Company's labor relations director, upon the latter's inquiry, that the Union's request was based upon Conrad's failure to pay dues for October, November and December 1957 (R. 51; 14). On February 3, 1958, Driver Supervisor Lloyd notified Conrad that he was discharged (R. 51; 24-25, 37).

### B. The Board's Conclusions and Order

On the basis of the foregoing facts, the Board found that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the Company to discharge Conrad for his non-payment of dues for October, a month during which he was not employed by the Company; and that the Company violated Section 8(a)(3) and (1) of the Act by discharging Conrad at the Union's request with knowledge of the Union's unlawful motivation. The Board further found that the Union violated Section 8(b)(1)(A) of the Act by threatening Conrad with loss of employment unless he paid dues for November and December at the rate of $6 per month, because the regular rate of dues was only $5 and the additional dollar constituted a penalty for late payment (R. 60-63, 51-52).

The Board's order (R. 62-68) directs both the Union

and the Company to cease and desist from the unfair labor practices found, and, jointly and severally, to make Conrad whole for any loss of earnings suffered by reason of their discrimination against him. The order also directs the Union to notify the Company and Conrad that it withdraws all objections to the employment of Conrad, and directs the Company to offer him immediate and full reinstatement.

### C. The Decision of the Court of Appeals

The Court of Appeals affirmed the Board's findings and conclusions as adequately supported by the record, and enforced the Board's order.

## ARGUMENT

1. As stated in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40, "§§ 8(a)(3) and 8(b)(2) [of the Act] were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." The first proviso to Section 8(a)(3), however, permits the employer and the union, in certain circumstances, to enter into an agreement requiring employees, as a condition of employment, to become and remain members of the union. An employee can be discharged under such agreement only for "failure * * * to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." A discharge to enforce any other obligation of union membership exceeds the protection of the proviso, and thus falls under the ban of Section 8(a)(3) and (b)(2).

In the Board's view, sustained by the court below,

such was the situation here. That is, Conrad was discharged for non-payment of dues in October, a month when he was not employed by the Company and thus not obligated under its union security agreement with the Union to pay dues to the Union. Moreover, he was threatened with discharge unless he paid a late fee of one dollar in addition to the normal dues for November and December. The principal question raised by the petitions is whether, as the court below held, the Board's findings in these respects are supported by substantial evidence.[4] Clearly, no issues warranting review by this Court are presented. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

2. In any event, there is ample evidentiary basis for the Board's findings. As shown pp. 3-5, *supra*, Conrad, although a Union member, did not pay dues in October when he was unemployed. He was hired by the Company on November 6, 1957 and executed a checkoff card authorizing the Company to deduct $5

[4] The petition in No. 775 also raises the question (Pet. 3) whether the application of a union security provision, to collect dues for a period prior to the time the employee became subject to it, exceeds the protection of the first proviso to Section 8(a)(3). This question is plainly insubstantial in the light of the terms of the proviso and settled authority. See *National Labor Relations Board* v. *Murphy's Motor Freight, Inc.*, 231 F. 2d 654 (C.A. 3); *Colonie Fibre Co.* v. *National Labor Relations Board*, 163 F. 2d 65, 67-68, 70 (C.A. 2); *National Labor Relations Board* v. *International Union*, 194 F. 2d 698, 701-702 (C.A. 7); *National Labor Relations Board* v. *Eclipse Lumber Co.*, 199 F. 2d 684, 685 (C.A. 9). Indeed, as the court below pointed out (Union Pet. 30), the briefs of both the Company and the Union in that Court implicitly conceded that, if substantial evidence supported the Board's finding, "the failure of Conrad to pay dues for October, a pre-hire month, would not constitute a legal basis for terminating his employment."

from his pay each month and remit that sum as dues to the Union. The Company did not deduct dues for November and December because it was its practice to make such deductions on a quarterly basis in advance, and Conrad was hired after the beginning of the last quarter in 1957. However, on January 2, 1958, it remitted quarterly dues to the Union, including $15 covering Conrad's dues for January, February and March. On January 30, the Union requested Conrad's discharge because he had failed to remain a member in good standing, and, when the Company's labor relations director inquired as to the reason, the Union president informed him that Conrad had failed to pay dues for October, November and December. On these facts, it is clear, as the Board found, that the reason for Conrad's discharge included his failure to pay dues in October, a month when he was not covered by the union security agreement, and that the Company was specifically apprised of this fact.[5]

Nor is the Union in any better position if it be assumed, as it contends (Pet. 13-17), that Conrad was discharged for failure to pay a reinstatement fee of $60, which the Union bylaws imposed for a dues delinquency of three months or more (see n. 2, *supra*). Even if a reinstatement fee can be analogized to a new

[5] The Company contends (Pet. 7-9) that it was unaware of the provision of the Union's Constitution (n. 2, *supra*) which deprived an employee of membership privileges only on failure to pay dues for three months, and thus could have assumed that Conrad's failure to pay December dues was alone sufficient for his discharge. This position is hardly tenable in the light of the fact that the Union linked the three months together; the Company itself customarily remitted dues to the Union on a three-month rather than a monthly basis; and any delinquency on Conrad's part for December was attributable not to Conrad, who had authorized a monthly checkoff, but to this Company practice.

initiation fee and thus be exacted under certain circumstances (see the cases cited at Union Pet. 15-16), it cannot be imposed where, as here, the delinquency justifying the fee depends upon counting a month not subject to the union security agreement. Otherwise, as the court below concluded (Union Pet. 31), this "would permit a union to do indirectly what it recognizes it is prohibited from doing directly."

3. Similarly, the facts here warranted the Board's conclusion, sustained by the court below, that the $6 fee which the Union demanded that Conrad pay for November and December was not "periodic dues" but rather included a penalty for late payment, which is not protected under the proviso to Section 8(a)(3). Thus, the Union bylaws provided (n. 3, *supra*) that: "The dues for this Local Union shall be not less than five ($5.00) Dollars per month and shall be paid on or before the first day of the current month. Dues paid after the first of the month shall be six ($6.00) Dollars." The International Constitution added (R. 45) that: "All members paying dues to local unions must pay them on or before the first business day of the current month, in advance. Any member failing to pay his dues at such time shall not be in good standing." Reading these two provisions together, it is apparent that the regular rate of dues was $5 per month, payable on or before the first day of the current month, and that the extra $1 was charged, not on any consistent basis or as a means of meeting operating costs, but only to penalize late payments. *National Labor Relations Board* v. *Bakery & Confectionery Workers, Local 12*, 245 F. 2d 211 (C.A. 3), relied on by the Union (Pet. 17-20), is distinguishable. There, as

the court below pointed out (Union Pet. 33), the by-laws, unlike those here, could be viewed as "allowing a discount from the stated monthly dues figure, if payment was made before the last day of the month in which dues were payable." Moreover, the record contained "affirmative evidence that [this] discount procedure was intended not as a punishment, but rather as a real inducement and reward for the prompt payment of monthly dues" (245 F. 2d at 214).

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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